Protection From Revictimization

CHAPTER 4

In this chapter . . .

This chapter deals with legal provisions that help to protect crime victims from being revictimized by an accused or convicted offender. The subjects discussed in this chapter include the following:

- **F** limitations on law enforcement officers' authority to release persons charged with assault and battery offenses;
- **F** the court's authority to impose conditions on the defendant's or juvenile's pretrial release that will serve to protect the victim from revictimization;

- limitations on a defendant's or juvenile's post-conviction release, including appeal bonds and imposition of probation or parole conditions to protect a named person;
- victim protections contained in the Crime Victim's Rights Act ("CVRA"), including revocation of pretrial release for threatening or intimidating the victim or the victim's immediate family, notice to the victim of suggested procedures to follow when threatened or intimidated, and separate waiting areas for victims in courthouses;
- offenses commonly committed by persons attempting to threaten or intimidate victims and witnesses; and
- contempt sanctions for interfering with a witness.

Notice of the release or escape of an accused or convicted offender also helps to protect crime victims from revictimization. For discussion of these topics, see Sections 7.3 (notice of pretrial release), 7.11 (notice of release pending appeal), 7.12(E) (notice of escape), 7.12(G) (notice of juvenile's discharge from court jurisdiction), and 7.12(K) (notice of prisoner's discharge from prison).

4.1 The Victim's Constitutional Right to Protection From Revictimization

A crime victim's right to protection from the accused is preserved in Michigan's constitution. Const 1963, art 1, § 24, states, in part:

> "(1) Crime victims, as defined by law, shall have the following rights, as provided by law:
>
> . . . .
>
> "The right to be reasonably protected from the accused throughout the criminal justice process."

This chapter discusses the legal provisions that help protect the safety of crime victims.

4.2 Limitations on Issuing Appearance Tickets After Warrantless Arrest

After a warrantless arrest, the officer must take the arrested individual before a magistrate without unnecessary delay for arraignment. The arresting officer must present to the magistrate a complaint stating the charges against the individual. MCL 764.13; MSA 28.871(1), and MCL 780.581(1); MSA 28.872(1)(1). However, if the alleged offense is a misdemeanor or ordinance violation with a maximum penalty of 93 days in jail, a fine, or both, the

arresting officer may issue an appearance ticket and release the defendant from custody. MCL 764.9c(1); MSA 28.868(3)(1).

To protect crime victims, MCL 764.9c(3); MSA 28.868(3)(3), provides that an appearance ticket shall *not* be issued to any of the following:

- a person arrested for violating MCL 750.81; MSA 28.276 (assault and battery), or a substantially corresponding local ordinance, or MCL 750.81a; MSA 28.276(1) (infliction of serious injury during an assault and battery), if the victim is the person's spouse or former spouse, has had a child in common with the person, or resides or has resided in the same household as the person;
- a person subject to detainment for violating a personal protection order; or
- a person subject to a mandatory period of confinement, condition of bond, or other condition of release, until the person has served the period of mandatory confinement or meets the requirement of bond or other condition of release.

4.3 Denial of Interim Bond for Domestic Assault and Battery Defendants

If a magistrate is not available for arraignment, or if immediate trial cannot be had, persons arrested without a warrant for certain misdemeanors or ordinance violations may be allowed to post an interim bond and obtain their release immediately after their arrest. The misdemeanor or ordinance violation must be punishable by imprisonment for not more than one year, a fine, or both. MCL 780.581(2); MSA 28.872(1)(2), states in part:

> "[I]f a magistrate is not available or immediate trial cannot be had, the person arrested may deposit with the arresting officer or the direct supervisor of the arresting officer or department, or with the sheriff or a deputy in charge of the county jail, . . . an interim bond to guarantee his or her appearance."

See also MCL 780.582; MSA 28.872(2) (interim bond is available to persons arrested for one-year misdemeanors or ordinance violations pursuant to an arrest warrant), and MCL 780.583a; MSA 28.872(3a) (the arresting officer may release the person on his or her own recognizance if the arrest is made pursuant to a misdemeanor warrant from another county). In felony cases, interim bond may be available to the defendant pursuant to MCR 6.102(D). That rule allows the court to specify on the arrest warrant the amount of the bond required to obtain the defendant's release before arraignment.

MCL 780.582a(a)–(b); MSA 28.872(2a)(a)–(b), provide that, in the following cases, an arrested person shall *not* be allowed to post an interim bond or be released on his or her own recognizance:*

- the person is arrested without a warrant under MCL 764.15a; MSA 28.874(1) (warrantless arrest for assault and battery in violation of MCL 750.81; MSA 28.276, MCL 750.81a; MSA 28.276(1), or a substantially corresponding local ordinance), or
- the person is arrested with a warrant for violating MCL 750.81; MSA 28.276 (assault and battery), or MCL 750.81a; MSA 28.276(1) (infliction of serious injury during assault and battery), or a substantially corresponding local ordinance, and the person is the victim's spouse or former spouse, or a past or present resident of the same household as the victim.

If a person taken into custody is not allowed to post interim bond, he or she must be brought before a magistrate for arraignment. However, if a magistrate is not available, or if a trial cannot be held within 24 hours of arrest, the person must be held for 20 hours. After 20 hours, the person may be released, either on interim bond or on his or her own recognizance. MCL 780.582a; MSA 28.872(2a). A person who violates a condition of release imposed pursuant to MCL 780.582a; MSA 28.872(2a), is subject to warrantless arrest. MCL 764.15e(1); MSA 28.874(5)(1).

Under MCL 780.581(3); MSA 28.872(1)(3), the person may be held beyond the 20-hour period if he or she is:

- under the influence of intoxicating liquor, a controlled substance, or a combination of the two;
- wanted by police to answer to another charge;
- unable to establish or demonstrate his or her identity; or
- otherwise unsafe to release.

*For a detailed discussion of the denial of interim bond in cases involving domestic violence, see Lovik, *Domestic Violence Benchbook: A Guide to Civil & Criminal Proceedings* (MJI, 2d ed, 2001), Section 4.3.

4.4 Conditions of Pretrial Release to Protect a Named Person

To enhance victim safety,* the court can issue an order for conditional pretrial release under MCL 765.6b; MSA 28.893(2), using SCAO Form MC 240, which is based on that statute. MCL 765.6b; MSA 28.893(2), permits the court to impose such conditions as are "reasonably necessary for the protection of 1 or more named persons." Release orders issued under this statute can be expeditiously enforced. They are entered into the LEIN system, and law enforcement officers have statutory authority to make a warrantless arrest upon reasonable cause to believe that a violation has occurred.

*For discussion of conditions that promote victim safety in domestic violence cases, see Lovik, *Domestic Violence Benchbook: A Guide to Civil & Criminal Proceedings* (MJI, 2d ed, 2001), Section 4.6.

A. Time to Impose Conditions

Bond conditions may be imposed at the time of the defendant's first appearance in court, or at any time during the pendency of the criminal case. See MCR 6.106(A) and (H)(2). The court may apply conditions to all types of bonds, including cash bonds and personal recognizance bonds. MCR 6.106(C)-(E).

B. Required Findings by Judge or District Court Magistrate

MCL 765.6b; MSA 28.893(2), requires the judge or district court magistrate to make a finding of the need for protective conditions. Moreover, the court must inform the defendant of both of the following on the record, either orally, or by a writing personally delivered to the defendant:

- The specific conditions imposed.
- The consequences of violating a condition of release. The defendant must be informed on the record that upon violation of a release condition, he or she "will be subject to arrest without a warrant and may have his or her bail forfeited or revoked and new conditions of release imposed, in addition to any other penalties that may be imposed if the defendant is found in contempt of court." MCL 765.6b(1); MSA 28.893(2)(1).

C. Factors to Consider in Determining Bond Conditions

MCL 765.6b; MSA 28.893(2), does not specify factors for the court to consider in determining what conditions are "reasonably necessary" to protect a person from further assault by the defendant. However, MCR 6.106(D) states that the court may impose conditions on pretrial release to "ensure the appearance of the defendant," or to "reasonably ensure the safety of the public." MCR 6.106(F)(1) provides that the court should consider "relevant information" in making its release decision. Under MCR 6.106(F)(1), "relevant information" includes:

"(a) defendant's prior criminal record, including juvenile offenses;

"(b) defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;

"(c) defendant's history of substance abuse or addiction;

"(d) defendant's mental condition, including character and reputation for dangerousness;

"(e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;

"(f) defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;

"(g) the availability of responsible members of the community who would vouch for or monitor the defendant;

"(h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence, and

"(i) any other facts bearing on the risk of nonappearance or danger to the public."

D. Contents of Conditional Release Orders

Under MCL 765.6b(2); MSA 28.893(2)(2), the court's order (or amended order) for conditional release must contain:

- defendant's full name;
- defendant's height, weight, race, sex, birth date, hair color, eye color, and any other appropriate identifying information;
- a statement of the effective date of the conditions;
- a statement of the order's expiration date; and
- a statement of the conditions imposed.

The court may also impose a prohibition on the defendant's purchase or possession of a firearm under MCL 765.6b(3); MSA 28.893(2)(3).

In conjunction with MCL 765.6b; MSA 28.893(2), MCR 6.106(D) further gives the court broad authority to impose any conditions or combination of conditions it determines are necessary to "reasonably ensure the appearance of the defendant as required, or . . . the safety of the public." Under MCR 6.106(D)(1), conditional release orders must provide that "the defendant will appear as required, will not leave the state without permission of the court, and will not commit any crime while released." Additionally, the court rule contains a lengthy, nonexclusive list of other specific conditions that the court may impose. Under MCR 6.106(D)(2), the court may require the defendant to:

> "(a) make reports to a court agency as are specified by the court or the agency;
>
> "(b) not use alcohol or illicitly use any controlled substance;
>
> "(c) participate in a substance abuse testing or monitoring program;
>
> "(d) participate in a specified treatment program for any physical or mental condition, including substance abuse;
>
> "(e) comply with restrictions on personal associations, place of residence, place of employment, or travel;
>
> "(f) surrender driver's license or passport;
>
> "(g) comply with a specified curfew;
>
> "(h) continue to seek employment;
>
> "(i) continue or begin an educational program;
>
> "(j) remain in the custody of a responsible member of the community who agrees to monitor the defendant and report any violation of any release condition to the court;
>
> "(k) not possess a firearm or other dangerous weapon;
>
> "(*l*) not enter specified premises or areas and not assault, beat, molest or wound a named person or persons;
>
> "(m) satisfy any injunctive order made a condition of release; or
>
> "(n) comply with any other condition, including the requirement of money bail . . . , reasonably necessary to ensure the defendant's appearance as required and the safety of the public."

E. LEIN Entry of Conditional Release Orders

Upon issuance of a release order (or a modified release order) under MCL 765.6b; MSA 28.893(2), the judge or district court magistrate must immediately direct a law enforcement agency within the court's jurisdiction to enter the order into the LEIN system. This notice to the law enforcement agency must be in writing. MCL 765.6b(4); MSA 28.893(2)(4). SCAO Form MC 240 can be used for this purpose.

F. Duration of Conditional Release Orders

Under MCL 765.6b(2)(d); MSA 28.893(2)(2)(d), the court's conditional release order (or modified order) must contain a statement of the order's expiration date. The duration of the release order is within the court's discretion, and court practices differ in this regard. Some courts issue orders of six months' duration in misdemeanor cases, and one year's duration in felony cases. Other courts specify a one year duration for release orders in all cases. The order should at least be of sufficient duration to cover the time needed to complete proceedings in the issuing court. In felony cases, six months is usually sufficient time to complete preliminary examination and bindover proceedings in district court. In specifying an expiration date, it is important to note that release conditions expire at 12:01 a.m. on the date specified in the order.

Unless it is modified, rescinded, or expired, the district court's conditional release order in a felony case continues in effect after the defendant has been bound over to circuit court. MCL 780.66(3); MSA 28.872(56)(3). The circuit court can continue or modify the district court's release order at arraignment, making it an order of the circuit court. If the only amendment the circuit court wishes to make is to extend the bond's expiration date, the court can complete SCAO Form MC 240a. If the conditions of bond release are to be amended in addition to, or instead of, the expiration date, the court should use SCAO Form MC 240. In any event, the court should contact the responsible law enforcement agency to enter the order into the LEIN system. After the circuit court's release order is entered into LEIN, SCAO Form MC 239 can be used to remove the district court's order from the system.

*See Section 4.7, below.

After a defendant's conviction, the court may continue bond conditions as orders of probation. Probation orders are entered into LEIN, and violation of a probation order will subject the offender to warrantless arrest under MCL 764.15(1)(g); MSA 28.874(1)(g).*

G. Penalties for a Violation of a Release Condition

If the court has imposed release conditions for the protection of a named person under MCL 765.6b(1); MSA 28.893(2)(1), a peace officer may arrest the defendant without a warrant upon reasonable cause to believe that the defendant is violating or has violated a release condition. MCL 764.15e; MSA

28.874(5). The warrantless arrest authority conferred in these statutes offers swift, significant protection to the person protected by the release order; MCR 6.106 contains no similar provision for warrantless arrest.

Violation of a condition of release imposed pursuant to MCL 765.6b; MSA 28.893(2), may result in forfeiture or revocation of bail and imposition of new conditions of release. These penalties may be imposed in addition to any penalties imposed if the defendant is found in contempt of court. MCL 765.6b(1); MSA 28.893(2)(1).

Violation of a condition of release imposed pursuant to MCL 765.6b; MSA 28.893(2), may also subject the defendant to penalties for contempt of court. MCL 765.6b(1); MSA 28.893(2)(1). Following a finding of criminal contempt, the court may order any or all of the following sanctions:

- an unconditional and fixed jail sentence of up to 30 days, MCL 600.1715(1); MSA 27A.1715(1);
- a fine of not more than $250.00, MCL 600.1715(1); MSA 27A.1715(1);
- damages caused by the contumacious conduct, MCL 600.1721; MSA 27A.1721, including attorney fees incurred as a result of the contumacious conduct, *In re Contempt of Calcutt (Calcutt v Harper Grace Hospitals),* 184 Mich App 749, 758 (1990).

4.5 Conditions of Release for Juveniles Pending Trial or Appeal

MCR 5.935(C)* provides that the court may release a juvenile without conditions to a parent pending the resumption of a preliminary hearing, pending trial, or until further order of the court. Alternatively, this rule allows the court to release a juvenile on the basis of any lawful conditions, including the requirement that bail be posted. The juvenile's parent, guardian, or custodian has a right to post bail for the release of the juvenile. MCL 712A.17(3); MSA 27.3178(598.17)(3). The court may also grant bail to a juvenile pending decision on a request for review of a referee's recommended findings and conclusions, MCR 5.991(F), or on a request for rehearing, MCR 5.992(F).

*MCR 5.935(C) applies to juvenile delinquency cases, "traditional waiver" cases, and designated cases. See Section 3.2(H) for descriptions of these types of cases.

When ordering conditions of release, the court must consider available information on the following factors:

> "(a) family ties and relationships,
>
> "(b) the juvenile's prior delinquency record,

> "(c) the juvenile's record of appearance or nonappearance at court proceedings,
>
> "(d) the violent nature of the alleged offense,
>
> "(e) the juvenile's prior history of committing acts that resulted in bodily injury to others,
>
> "(f) the juvenile's character and mental condition,
>
> "(g) the court's ability to supervise the juvenile if placed with a parent or relative, and
>
> "(h) any other factor indicating the juvenile's ties to the community, the risk of nonappearance, and the danger to the juvenile or the public if the juvenile is released." MCR 5.935(C)(1)(a)–(h).

*See Section 3.2(H) for a description of "automatic waiver" proceedings.

MCR 6.909(A) governs the availability of release for juveniles charged or convicted as adults in "automatic waiver" proceedings.* MCR 6.909(A)(1) allows the magistrate or district court judge to "order a juvenile released to a parent or guardian on the basis of any lawful condition, including that bail be posted." When ordering conditions of release in "automatic waiver" cases, the court may consider the same factors as in cases involving adults. MCR 6.901(A). These factors are listed in Section 4.4(C).

*See Section 4.4(D), above, for a discussion of pretrial release conditions for adult criminal defendants.

Thus, regardless of whether the juvenile is subject to delinquency or criminal proceedings, he or she may be released "on the basis of any lawful conditions." Conditions of release to protect a named person imposed pursuant to MCL 765.6b; MSA 28.893(2), are "lawful conditions" and may therefore be imposed on juveniles.*

In juvenile delinquency cases, designated cases, and "traditional waiver" cases, MCL 712A.14(1); MSA 27.3178(598.14)(1), provides law enforcement officers with broad authority to take a juvenile into custody for violating a condition of release. That statute allows a law enforcement officer, county agent, or probation officer, without a court order, to take into custody any juvenile who is found violating any law or ordinance, or whose surroundings are such as to endanger the juvenile's health, morals, or welfare. The court may modify or revoke bail for good cause after providing the parties notice and an opportunity to be heard. MCR 5.935(C)(5). In addition, the court may issue an order authorizing a peace officer or other person designated by the court to apprehend a juvenile who is absent without leave from an institution or agency to which the juvenile has been committed, has violated probation, or has failed to appear for a hearing on a petition. MCL 712A.2c; MSA 27.3178(598.2c).

The rules applicable to criminal cases involving adults regarding enforcement of pretrial release conditions may be applied to "automatic waiver" proceedings. MCR 6.901(A).*

*These rules are discussed in Sections 4.4(E)–(G), above.

4.6 Limitations on Bond Pending Sentencing or Appeal for "Assaultive Crimes"

The trial judge may release the defendant on bond pending sentencing or appeal by the defendant "if the offense charged is bailable and if the offense is not an assaultive crime. . . ." MCL 770.8; MSA 28.1105, and MCL 770.9; MSA 28.1106.*

*See MCR 6.106(B)(1)–(2) (offenses for which bail may be denied) and 3.2(A)(1) (list of "assaultive crimes").

If the defendant has been convicted of an "assaultive crime," he or she shall not be permitted to post bond pending sentencing or appeal unless the trial court finds by clear and convincing evidence that defendant is not likely to pose a danger to other persons, including the victim. MCL 770.9a(1)–(2); MSA 28.1106(1)(1)–(2).

If the prosecuting attorney appeals, the defendant shall be permitted to post bond on his or her own recognizance, pending determination of the appeal, "unless the trial court determines and certifies that the character of the offense, the respondent, and the questions involved in the appeal, render it advisable that bail be required." MCL 765.7; MSA 28.894.

4.7 Conditions of Probation and Parole Orders to Protect a Named Person

If the defendant is placed on probation following conviction, the court may order probation conditions "reasonably necessary for the protection of 1 or more named persons." MCL 771.3(2)(o); MSA 28.1133(2)(o). Similarly, a parole order may contain a condition intended to protect one or more named persons. MCL 791.236(14); MSA 28.2306(14). Probation and parole conditions are entered into LEIN, and violators are subject to warrantless arrest. MCL 771.3(5); MSA 28.1133(5), MCL 791.236(14); MSA 28.2306(14), and MCL 764.15(1)(g); MSA 28.874(1)(g). Defendants who violate these or any other conditions of probation or parole are also subject to revocation of their probation or parole. MCL 771.4; MSA 28.1134, and MCL 791.238; MSA 28.2308.

In addition, several statutes dealing with specific offenses allow the court to include or enforce "no contact" conditions in probation orders. See the following statutes:

- **F** MCL 771.2a(1) and (2); MSA 28.1132(1)(1) and (2), MCL 750.411h(3)(b); MSA 28.643(8)(3)(b), and MCL 750.411*i*(4)(b); MSA 28.643(9)(4)(b) (court may include "no contact" provision in

probation orders for offenders convicted of stalking or aggravated stalking);

- MCL 769.4a(4)(c); MSA 28.1076(1)(4)(c) (in deferred proceedings for first-time domestic assault and battery offenders, court may revoke probation for violation of "no contact" order); and
- MCL 750.350a(4); MSA 28.582(1)(4) (in deferred proceedings for first-time parental kidnapping offenders, court may order "lawful terms and conditions," which include "no contact" provisions under the general probation statutes cited above); and
- MCL 762.13(1)(b) and (2); MSA 28.853(13)(1)(b) and (2) (offenders placed on youthful trainee status may be subject to probation conditions as provided in the general probation statutes cited above).

In juvenile delinquency cases, MCL 712A.18(1); MSA 27.3178(598.18)(1), provides that the court may order any of several types of disposition appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained. The court's dispositional options include placing the juvenile on probation, or under supervision, in the juvenile's own home or in the home of an adult who is related to the juvenile. MCL 712A.18(1)(b); MSA 27.3178(598.18)(1)(b). The court must order terms and conditions of probation or supervision, which may include a condition that the juvenile have no contact with the victim. If the juvenile violates a condition of probation, the court may make a supplemental disposition, including revoking probation and detaining or committing the juvenile to a public institution. MCR 5.944(A)(6).

4.8 Separate Waiting Areas for Crime Victims

MCL 780.757; MSA 28.1287(757), states as follows:

> "The court shall provide a waiting area for the victim separate from the defendant, defendant's relatives, and defense witnesses if such an area is available and the use of the area is practical. If a separate waiting area is not available or practical, the court shall provide other safeguards to minimize the victim's contact with defendant, defendant's relatives, and defense witnesses during court proceedings."

MCL 780.787; MSA 28.1287(787), and MCL 780.817; MSA 28.1287(817), contain substantially similar provisions for proceedings involving juveniles and adults charged with "serious misdemeanors."

If available and practical, an unused jury deliberation room, conference room, or isolated hallway could be used to minimize contact between the defendant or juvenile and the victim. The local victim-witness assistance program may

have space available as well. In addition, the times that the defendant or juvenile and victim arrive at and leave the courthouse may be staggered to further limit contact between them.

4.9 Limitations on Testimony Identifying a Victim's Address, Place of Employment, or Other Information

As a general rule in criminal cases, MCR 6.201(A)(1) requires disclosure to the opposing party of the names and addresses of all lay witnesses that a party intends to call as witnesses at trial, including victims.* However, certain limitations on testimony exist to protect victims of crime.

*In juvenile delinquency cases, MCR 5.922(A)(1)(c) allows discovery of only the names of prospective witnesses.

In certain circumstances, the prosecuting attorney may request that a victim's identifying information be protected from disclosure at trial. MCL 780.758(1); MSA 28.1287(758)(1), states:

> "Based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at defendant's direction against the victim or the victim's immediate family, the prosecuting attorney may move that the victim or any other witness not be compelled to testify at pretrial proceedings or at trial for purposes of identifying the victim as to the victim's address, place of employment, or other personal identification without the victim's consent. A hearing on the motion shall be in camera."

MCL 780.818; MSA 28.1287(818), which applies to misdemeanor cases, contains the same protections. MCL 780.788; MSA 28.1287(788), which applies to juvenile delinquency proceedings, provides similar protection, except that, if the prosecuting attorney is absent, the victim may move to limit testimony.

In *Alford v United States,* 282 US 687, 692–94; 51 S Ct 218; 75 L Ed 624 (1931), the United States Supreme Court held that it was error for the trial court to prohibit cross-examination of a prosecution witness regarding the witness' place of residence. In *Smith v Illinois,* 390 US 129, 133; 88 S Ct 748; 19 L Ed 2d 956 (1968), the Supreme Court held that the trial court's refusal to allow the defendant to cross-examine a witness concerning his real name and address denied defendant his federal constitutional right to confront the witnesses against him. See also *People v Paduchoski,* 50 Mich App 434, 438 (1973) (the trial court denied defendant his federal constitutional right of confrontation by refusing to allow cross-examination regarding a witness' place of employment).

However, there are two exceptions to the rules stated in *Alford* and *Smith.* The trial court may limit cross-examination regarding a witness' address if the questions tend merely to harass, annoy, or humiliate the witness, or if the

questions would tend to endanger the personal safety of the witness. *Alford, supra,* at 694, and *Smith, supra,* at 134–35 (White, J, concurring).

In *People v McIntosh,* 400 Mich 1, 8 (1977), the Michigan Supreme Court held that the trial court did not err in refusing to allow defense counsel to ask a key prosecution witness where she lived. The witness' address was available in police reports and the prosecutor's case file, and the witness had been threatened by several spectators in the courtroom.

4.10 Notice of Procedures to Follow When the Victim Is Threatened or Intimidated

*See Section 7.6 for more discussion of these statutes.

The prosecuting attorney must notify the victim of suggested procedures to follow if threatened or intimidated by or at the direction of the defendant or juvenile. MCL 780.756(1)(e); MSA 28.1287(756)(1)(e), MCL 780.786(2)(e); MSA 28.1287(786)(2)(e), and MCL 780.816(1)(e); MSA 28.1287(816)(1)(e).* The prosecutor must provide this notice within the following time limits:

- in felony cases, not later than seven days after the defendant's arraignment, but not less than 24 hours before a preliminary examination, MCL 780.756(1); MSA 28.1287(756)(1);
- in juvenile cases, within 72 hours after the prosecuting attorney files or submits a petition, MCL 780.786(2); MSA 28.1287(786)(2); and
- in cases involving "serious misdemeanors," within 48 hours after receiving notice from the court of proceedings that will occur after arraignment, MCL 780.816(1); MSA 28.1287(816)(1).*

*The statute requires the court to provide this notice to the prosecutor within 48 hours of the arraignment.

Typically, victims are advised to immediately contact the police, prosecuting attorney, or "victim-witness assistant" if threatened or intimidated. Victims may also be advised to seek a personal protection order (PPO).

4.11 Revocation of Release Under the Crime Victim's Rights Act ("CVRA")

The CVRA allows for revocation of the alleged offender's release based on threats or violence against the victim or the victim's immediate family.

*See Section 3.2(H) for a description of "automatic waiver" proceedings.

MCL 780.755(2); MSA 28.1287(755)(2), which applies to felony offenses charged against adults and juveniles subject to "automatic waiver" proceedings,* states:

> "Based upon any credible evidence of acts or threats of physical violence or intimidation by the defendant or at the defendant's direction against the victim or the victim's

> immediate family, the prosecuting attorney may move that the bond or personal recognizance of a defendant be revoked."

The juvenile article of the CVRA, which applies to juvenile delinquency proceedings, contains a similar provision. MCL 780.785(2); MSA 28.1287(785)(2).

The misdemeanor article of the CVRA contains two provisions dealing with revocation of release for acts or threats of violence or intimidation. MCL 780.813a; MSA 28.1287(813a), contains the same language as MCL 780.755(2); MSA 28.1287(755)(2), quoted above. However, MCL 780.815(2); MSA 28.1287(815)(2), requires that the victim submit an affidavit before the prosecuting attorney may move for revocation of the defendant's release. That provision states:

> "If the victim submits an affidavit asserting acts or threats of physical violence or intimidation by the defendant or at the defendant's direction against the victim or the victim's immediate family, the prosecuting attorney, based on the victim's affidavit, may move that the bond or personal recognizance of a defendant be revoked."

Thus, where the defendant has been charged with or convicted of a "serious misdemeanor,"* the victim must submit an affidavit alleging acts or threats of violence or intimidation before the prosecuting attorney may move for revocation of the defendant's release.

*See Section 3.2(N) for a list of "serious misde-meanors."

Victim and witness intimidation may be case-specific (intended to dissuade a victim or witness from testifying in a particular case) or community-wide. In the latter case, acts by youth gangs or drug-selling groups create a general atmosphere of fear within a neighborhood or community. Healy, *Victim and Witness Intimidation: New Developments and Emerging Responses* (Washington, DC: National Institute of Justice, 1995), p 1. Victims and witnesses may be deterred from testifying even though no overt threat is made. *Id.* at 3. Threats may be indirect, such as when gang or group members park outside the victim's or witness' house, issue vague verbal warnings, use threatening hand gestures, or "pack the courtroom" with gang or group members. *Id.* at 4. The provisions of the CVRA discussed above allow revocation of release based upon the victim's reasonable apprehension of threat or intimidation, and the reasonableness of the victim's apprehension may be interpreted in light of the prevailing atmosphere in a neighborhood or community.

For discussion of criminal offenses that may be committed while threatening or intimidating a witness, see Section 4.12, below. If a defendant's or juvenile's misconduct renders a witness "unavailable" to testify at trial, the witness's out-of-court statements may be admissible at trial. See Section 8.11(G).

4.12 Criminal Offenses That May Be Committed While Threatening or Intimidating a Victim

This section addresses criminal offenses that are commonly committed when a crime victim is threatened or intimidated.

A. "Obstruction of Justice"

*Both statutes are effective March 28, 2001.

"Obstruction of justice" is prohibited under the common law and by 2000 PA 451, MCL 750.483a; MSA 28.751(1), and 2000 PA 452, MCL 750.122; MSA 28.317.* Common-law offenses may be abolished by statute. Const 1963, art 3, § 7. However, "where there is nothing in the language of a statute to the contrary, it is appropriate to give reference to established rules of common law in ascertaining the meaning of [a statute's] provisions." *J & L Investment Co v DNR,* 233 Mich App 544, 549 (1999). Thus, when interpreting these recently enacted statutes, it may be proper to refer to the case law cited below on common-law "obstruction of justice."

1. Statutory Offenses

Two recent amendments to the Penal Code prohibit actions that discourage or prevent persons from reporting crimes and testifying in official proceedings regarding those crimes. MCL 750.483a; MSA 28.751(1), penalizes interference with the reporting of crimes. Under MCL 750.483a(1)(b)–(c); MSA 28.751(1)(1)(b)–(c), it is unlawful to do any of the following:

> "(b) Prevent or attempt to prevent through the unlawful use of physical force another person from reporting a crime committed or attempted by another person.
>
> "(c) Retaliate or attempt to retaliate against another person for having reported or attempted to report a crime committed or attempted by another person. As used in this subsection, "retaliate" means to do any of the following:
>
> > "(i) Commit or attempt to commit a crime against any person.
> >
> > "(ii) Threaten to kill or injure any person or threaten to cause property damage.

Under MCL 750.483a(3)(b); MSA 28.751(1)(3)(b), it is unlawful to do the following:

> "Threaten or intimidate any person to influence a person's statement to a police officer conducting a lawful investigation of a crime or the presentation of evidence to a police officer conducting a lawful investigation of a crime."

It is an affirmative defense to charges under MCL 750.483a(3); MSA 28.751(1)(3), that the defendant's conduct was entirely lawful "and that the defendant's sole intention was to encourage, induce, or cause the other person to provide a statement or evidence truthfully." MCL 750.483a(7); MSA 28.751(1)(7).

A violation of these provisions constitutes a misdemeanor punishable by imprisonment for not more than one year, a fine of not more than $1,000.00, or both. A violation involving the commission or attempt to commit a crime against the person, or a threat to kill or injure the person or cause property damage constitutes a felony punishable by imprisonment for not more than 10 years, a fine of not more than $20,000.00, or both. MCL 750.483a(2) and (4); MSA 28.751(1)(2) and (4).

MCL 750.122; MSA 28.317, prohibits acts that discourage or prevent victims from testifying in official proceedings. "Official proceedings" include judicial proceedings and depositions conducted by prosecuting attorneys. MCL 750.122(12)(a); MSA 28.317(12)(a). The proceeding need not take place and the victim or witness need not have been subpoenaed or ordered to appear in the proceeding. However, the defendant must know or have reason to know that the victim could be a witness at an official proceeding. MCL 750.122(9); MSA 28.317(9).

Under MCL 750.122(3); MSA 28.317(3), it is unlawful to do any of the following by threat or intimidation:

> "(a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
>
> "(b) Influence or attempt to influence testimony at a present or future official proceeding.
>
> "(c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding."

It is an affirmative defense to charges under MCL 750.122(3); MSA 28.317(3), that the defendant's conduct was entirely lawful "and that the defendant's sole intention was to encourage, induce, or cause the other person to testify or provide evidence truthfully." MCL 750.122(4); MSA 28.317(4).

MCL 750.122(6); MSA 28.317(6), prohibits a person from willfully impeding, interfering with, obstructing, or attempting to impede, interfere with, or obstruct "the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding."

Violations of MCL 750.122(3) and (6); MSA 28.317(3) and (6), subject the defendant to the following penalties:

- except as provided below, a felony punishable by imprisonment for not more than four years, a fine of not more than $5,000.00, or both;
- "[i]f the violation is committed in a criminal case for which the maximum term of imprisonment for the violation is more than 10 years, or the violation is punishable by imprisonment for life or any term of years," a felony punishable by imprisonment for not more than 10 years, a fine of not more than $20,000.00, or both;
- "[i]f the violation involves committing or attempting to commit a crime or a threat to kill or injure any person or to cause property damage," a felony punishable by imprisonment for not more than 15 years," a fine of not more than $25,000.00, or both. MCL 750.122(7); MSA 28.317(7).

In addition, MCL 750.122(8); MSA 28.317(8), prohibits retaliating, attempting to retaliate, or threatening to retaliate against a person for having been a witness in a judicial proceeding. "Retaliate" means either of the following:

- committing or attempting to commit a crime against any person, or
- threatening to kill or injure any person or threatening to cause property damage. *Id.*

A violation of this provision is a felony punishable by imprisonment for not more than 10 years, a fine of not more than $20,000.00, or both. *Id.*

2. Common-Law Offense

"Obstruction of justice" is also prohibited under the common law. MCL 750.505; MSA 28.773, provides that common-law criminal offenses are felonies punishable by imprisonment for not more than five years, a fine of not more than $10,000.00, or both. "Obstruction of justice" actually encompasses several common-law offenses, including intimidation or coercion of witnesses in judicial proceedings. *People v Vallance,* 216 Mich App 415, 419 (1996).

A person obstructs justice when he or she attempts to dissuade a witness through threats or coercion from testifying in a judicial proceeding. The attempt may be made through words or actions and need not be successful. *People v Coleman,* 350 Mich 268, 280 (1957). However, it must be shown that the defendant had a specific intent to dissuade the witness from testifying. In other words, the words or acts that constitute the attempt must unambiguously refer to the victim's testimony. *Id.* at 278. In *Coleman,* the Court affirmed the defendant's conviction for "obstruction of justice" where the defendant sent an agent to tell the witness that if the witness didn't testify

against the defendant, the defendant would not reveal to the witness' wife that the witness was having an extramarital affair.

In *People v Tower,* 215 Mich App 318, 320–21 (1996), the Court of Appeals held that there was no probable cause to believe that the defendant intended to obstruct justice. The defendant told another jail inmate who was to testify against the defendant's cellmate, "You're making a mistake." *Id.* at 319. The Court concluded that defendant's statement did not unambiguously refer to the witness' impending testimony. The Court in *Tower* distinguished *Coleman, supra,* on grounds that the threat in that case was more specific and referred directly to the witness' impending testimony. *Id.* at 321.

B. Extortion

MCL 750.213; MSA 28.410, states, in pertinent part:

> "Any person who . . . shall orally or by any written or printed communication maliciously threaten any injury to the person or property or mother, father, husband, wife or child of another . . . with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years or by a fine of not more than 10,000 dollars."

Although extortion often involves a defendant who seeks some pecuniary advantage by threatening the victim, it may also be charged when the defendant threatens a witness in an attempt to dissuade the witness from testifying. *People v Atcher,* 65 Mich App 734, 736, 738 (1975).

To convict a defendant of extortion arising from a compelled action or omission, the prosecuting attorney must prove the existence of a threat of immediate, continuing, or future harm. *People v Peña,* 224 Mich App 650, 656 (1997), modified on other grounds 457 Mich 885 (1998). The threat must be written or stated; a gesture alone is insufficient. CJI2d 21.1(3). The threat must result in the victim undertaking an action of serious consequence, such as refusing to testify. *People v Fobb,* 145 Mich App 786, 791–93 (1985), and *People v Hubbard (After Remand),* 217 Mich App 459, 485–86 (1996).

In *People v Peña,* 224 Mich App 650, 654–55 (1997), the defendant badly beat the victim and threatened future harm if the victim said anything to police. On appeal, defendant argued that the extortion statute did not apply to her conduct. The Court of Appeals disagreed, finding that defendant's demand that the victim not talk to the police was "of such consequence or seriousness that the statute should apply." *Id.* at 656–57. The Court distinguished *Fobb, supra,* in which the defendant forced the victim to write a note stating that the victim had been "spreading lies" about the defendant. The Court in *Fobb* concluded that the defendant's act was a minor threat of no

serious consequence to the victim and was, therefore, not covered by the extortion statute.

In *Peña, supra,* at 657–58, the Court of Appeals also held that punishment for both extortion and "obstruction of justice" did not violate constitutional prohibitions against double jeopardy.

C. Stalking and Aggravated Stalking

*MCL 600.2954; MSA 27A.2954, provides a tort action for stalking behavior.

"Stalking" is a criminal misdemeanor* under MCL 750.411h; MSA 28.643(8). The statute defines the elements of stalking as follows:

- ". . . a willful course of conduct involving repeated or continuing harassment of another individual";
- "that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested"; and,
- "that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(d); MSA 28.643(8)(1)(d).

In a criminal prosecution for stalking, evidence that the defendant continued to make unconsented contact with the victim after the victim requested the defendant to cease doing so raises a rebuttable presumption that the continued contact caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411h(4); MSA 28.643(8)(4).

The following definitions further explain this offense:

- A "course of conduct" involves a series of two or more separate, noncontinuous acts evidencing a continuity of purpose. MCL 750.411h(1)(a); MSA 28.643(8)(1)(a).
- "Harassment" means conduct including, but not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim emotional distress. Harassment does not include constitutionally protected activity or conduct serving a legitimate purpose. MCL 750.411h(1)(c); MSA 28.643(8)(1)(c).
- "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling. MCL 750.411h(1)(b); MSA 28.643(8)(1)(b).
- Under MCL 750.411h(1)(e); MSA 28.643(8)(1)(e), "unconsented contact" includes, but is not limited to:
  - following or appearing within the victim's sight;

- approaching or confronting the victim in a public place or on private property;
- appearing at the victim's workplace or residence;
- entering onto or remaining on property owned, leased, or occupied by the victim;
- contacting the victim by phone, mail, or electronic communications; or
- placing an object on, or delivering an object to, property owned, leased, or occupied by the victim.

Except in cases where the victim is less than 18 years of age and the offender is five or more years older than the victim, misdemeanor stalking is punishable by imprisonment for not more than one year, a fine of not more than $1,000.00, or both. MCL 750.411h(2)(a); MSA 28.643(8)(2)(a). Under MCL 750.411h(3); MSA 28.643(8)(3), the court may place the offender on probation for a term of not more than five years. If the court orders probation, it may impose any lawful condition of probation, and in addition, may order the offender to:

F refrain from stalking any individual during the term of probation;

F refrain from having any contact with the victim of the offense; or

F be evaluated to determine the need for psychiatric, psychological, or social counseling, and to receive such counseling at his or her own expense.

MCL 750.411h(2)(b); MSA 28.643(8)(2)(b), provides for enhanced penalties where the victim is less than 18 years of age at any time during the offender's course of conduct, and the offender is five or more years older than the victim. In such cases, stalking is a felony punishable by imprisonment for not more than five years or a fine of not more than $10,000.00, or both.

Under MCL 750.411i(2); MSA 28.643(9)(2), a person who engages in stalking is guilty of the felony of aggravated stalking if the violation involves any of the following circumstances:

F At least one of the actions constituting the offense is in violation of a restraining order of which the offender has actual notice, or at least one of the actions is in violation of an injunction or preliminary injunction. There is no language in the aggravated stalking statute stating that the order violated must have been issued by a Michigan court—violations of sister state or tribal orders may also result in aggravated stalking charges.

F At least one of the actions constituting the offense is in violation of a condition of probation, parole, pretrial release, or release on bond pending appeal.

- The person's conduct includes making one or more credible threats against the victim, a family member of the victim, or another person living in the victim's household. A "credible threat" is a threat to kill or to inflict physical injury on another person, made so that it causes the person hearing the threat to reasonably fear for his or her own safety, or for the safety of another. MCL 750.411i(1)(b); MSA 28.643(9)(1)(b).

- The offender has been previously convicted of violating either of the criminal stalking statutes.

In a criminal prosecution for aggravated stalking, evidence that the defendant continued to make unconsented contact with the victim after the victim requested the defendant to cease doing so raises a rebuttable presumption that the continued contact caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411i(5); MSA 28.643(9)(5).

Except in cases where the victim is less than 18 years of age and the offender is five or more years older than the victim, aggravated stalking is punishable by imprisonment for not more than five years or a fine of not more than $10,000.00, or both. MCL 750.411i(3)(a); MSA 28.643(9)(3)(a). Under MCL 750.411i(4); MSA 28.643(9)(4), the court may place an offender on probation for any term of years, but not less than five years.* If it orders probation, the court may impose any lawful condition, and may additionally order the offender to:

*MCL 771.2a(2); MSA 28.1132(1)(2), makes similar provision.

- refrain from stalking any individual during the term of probation;

- refrain from any contact with the victim of the offense; or

- be evaluated to determine the need for psychiatric, psychological, or social counseling, and to receive such counseling at his or her own expense.

MCL 750.411i(3)(b); MSA 28.643(9)(3)(b), provides for enhanced penalties where the victim is less than 18 years of age at any time during the offender's course of conduct, and the offender is five or more years older than the victim. In such cases, aggravated stalking is punishable by imprisonment for not more than ten years or a fine of not more than $15,000.00, or both.

D. Malicious Use of the Telephone

The accused may attempt to intimidate or threaten a crime victim through use of the telephone. MCL 750.540e; MSA 28.808(5), prohibits malicious use of a service provided by a communications common carrier, including telephone service. That statute states, in pertinent part:

> "(1) Any person is guilty of a misdemeanor who maliciously uses any service provided by a

communications common carrier with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy any other person, or to disturb the peace and quiet of any other person by any of the following:

> "(a) Threatening physical harm or damage to any person or property in the course of a telephone conversation.
>
> . . . .
>
> "(e) Repeatedly initiating a telephone call and, without speaking, deliberately hanging up or breaking the telephone connection as or after the telephone call is answered.
>
> . . . .

"(2) Any person violating this section may be imprisoned for not more than 6 months, or fined not more than $500.00, or both. . . ."

E. Property Offenses

In addition to threatening or intimidating the victim directly, the accused may damage or destroy the victim's property in an effort to threaten or intimidate the victim. The property offenses that may be committed by the accused are too numerous to discuss in detail in this manual. Commonly committed property offenses may include the following:

- arson, MCL 750.71 et seq; MSA 28.266 et seq.;
- breaking and entering, MCL 750.110 et seq.; MSA 28.305 et seq.; and
- malicious destruction of property, MCL 750.377a et seq.; MSA 28.609(1) et seq.

4.13 Contempt of Court for Interfering With a Witness

MCL 600.1701(h); MSA 27A.1701(h), states, in pertinent part:

> "The supreme court, circuit courts, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> . . . .

> "(h) . . . for unlawfully detaining any witness or party to an action while he is going to, remaining at, or returning from the court where the action is pending for trial, or for any other unlawful interference with or resistance to the process or proceedings in any action."

Following a finding of criminal contempt for interfering with a witness, the court may order any or all of the following sanctions:

- an unconditional and fixed jail sentence of up to 30 days, MCL 600.1715(1); MSA 27A.1715(1);
- a fine of not more than $250.00, MCL 600.1715(1); MSA 27A.1715(1);
- damages caused by the contumacious conduct, MCL 600.1721; MSA 27A.1721, including attorney fees incurred as a result of the contumacious conduct, *In re Contempt of Calcutt (Calcutt v Harper Grace Hospitals),* 184 Mich App 749, 758 (1990).

Threatening a complaining witness in a criminal case may be punished as contempt of court. *In the Matter of the Contempt of Evelyn Nathan (People v Traylor),* 99 Mich App 492, 493 (1980). A person may also be found in contempt of court for attempting to prevent the attendance of a person not yet subpoenaed as a witness. *Montgomery v Circuit Judge,* 100 Mich 436, 441 (1894).